(23)

No. 04-480

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,
Petitioners,

v.

GROKSTER, LTD., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR MOTION PICTURE STUDIO AND RECORDING COMPANY PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit erred in concluding, contrary to long-established principles of secondary liability in copyright law (and in acknowledged conflict with the Seventh Circuit), that the Internet-based "file sharing" services Grokster and StreamCast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their services and that constitute at least 90% of the total use of the services.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioners here and appellants below are Metro-Goldwyn-Mayer Studios Inc.; Columbia Pictures Industries, Inc.; Disney Enterprises, Inc.; Warner Bros. Entertainment Inc. (as successor-in-interest to the Filmed Entertainment Division of Time Warner Entertainment Company, L.P.); New Line Cinema Corporation; Paramount Pictures Corporation; Twentieth Century Fox Film Corporation; Universal City Studios LLLP (f/k/a Universal City Studios, Inc.); Arista Records, Inc.; Atlantic Recording Corporation; Rhino Entertainment Company; Bad Boy Records; Capitol Records, Inc.; Elektra Entertainment Group Inc.; Hollywood Records, Inc.; Interscope Records; LaFace Records, Inc.; London-Sire Records Inc.; Motown Record Company, L.P.; The RCA Records Label, a unit of BMG Music d/b/a BMG Entertainment; Sony Music Entertainment Inc.; UMG Recordings, Inc.; Virgin Records America, Inc.; Walt Disney Records; Warner Bros. Records Inc.; WEA International Inc.; Warner Music Latina Inc.; Zomba Recording Corporation; Jerry Leiber, individually and d/b/a Jerry Leiber Music; Mike Stoller, individually and d/b/a Mike Stoller Music; Peer International Corporation; Songs of Peer, Limited; Peermusic, Limited; Criterion Music Corporation; Famous Music Corporation; Bruin Music Company; Ensign Music Corporation; Let's Talk Shop, Inc. d/b/a Beau-Di-O-Do Music.

The appellees below and respondents here are Grokster, Ltd. and StreamCast Networks, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

The parent company of Petitioner Metro-Goldwyn-Mayer Studios Inc. is Metro-Goldwyn-Mayer Inc., a publicly traded corporation.

The parent company of Petitioner Columbia Pictures Industries, Inc. is Sony Corporation, a publicly traded corporation.

The parent company of Petitioner Disney Enterprises, Inc. is The Walt Disney Company, a publicly traded corporation.

The indirect parent company of Petitioner Paramount Pictures Corporation is Viacom Inc., a publicly traded corporation.

The parent of Petitioner Warner Bros. Entertainment Inc. (as successor-in-interest to the Filmed Entertainment Division of Time Warner Entertainment Company, L.P.) is Time Warner Inc., a publicly traded company.

The parent of Petitioner New Line Cinema Corporation is Time Warner Inc., a publicly traded company.

The parent companies of Petitioner Twentieth Century Fox Film Corporation are Fox Entertainment Group, Inc. and The News Corporation Limited, both of which are publicly traded corporations.

The parent companies of Petitioner Universal Studios LLLP (f/k/a Universal City Studios, Inc.) are General Electric Company and Vivendi Universal S.A., both of which are publicly traded corporations.

The parent companies of Petitioner Arista Records, LLC (f/k/a Arista Records, Inc.) are Sony Corporation, a publicly

traded corporation, and Bertelsmann AG, which is not publicly traded.

The parent company of Petitioner Atlantic Recording Corporation is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Rhino Entertainment Company is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Capitol Records, Inc. is EMI Group PLC, which is publicly traded in the U.K.

The parent company of Petitioner Elektra Entertainment Group Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Hollywood Records is The Walt Disney Company, a publicly traded corporation.

The parent company of Petitioner Interscope Records is Vivendi Universal S.A., a publicly held French company.

The parent companies of Petitioner LaFace Records, LLC (f/k/a LaFace Records, Inc.) are Sony Corporation, a publicly traded corporation, and Bertelsmann AG, which is not publicly traded.

The parent company of Petitioner London-Sire Records Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Motown Record Company, L.P. is Vivendi Universal S.A., a publicly held French company.

The parent companies of Petitioner The RCA Records Label are Sony Corporation, a publicly traded corporation, and Bertelsmann AG, which is not publicly traded.

The parent companies of Sony BMG Music Entertainment (successor-in-interest to Sony Music Entertainment Inc.) are Sony Corporation, a publicly traded corporation, and Bertelsman AG, which is not publicly traded.

The parent company of Petitioner UMG Recordings, Inc. is Vivendi Universal S.A., a publicly held French company.

The parent company of Petitioner Virgin Records America, Inc. is EMI Group PLC, which is publicly traded in the U.K.

The parent company of Petitioner Walt Disney Records is The Walt Disney Company, a publicly traded corporation.

The parent company of Petitioner Warner Bros. Records Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner WEA International Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent company of Petitioner Warner Music Latina Inc. is WMG Parent Corp., which is not a publicly traded corporation.

The parent companies of Petitioner Zomba Recording, LLC (f/k/a Zomba Recording Corporation) are Sony Corporation, a publicly traded corporation, and Bertelsmann AG, which is not publicly traded.

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JURISDICTION

The court of appeals entered its judgment on August 19, 2004. The petition for writ of certiorari was timely filed on October 8, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Copyright Act, 17 U.S.C. § 101 *et seq.*, reproduced at Pet. App. 57a-60a.

STATEMENT OF THE CASE

Respondents Grokster and StreamCast operate Internet-based services that contribute to copyright infringement on a "mind-boggling" scale.[1] Their services make it possible for millions of users to reproduce and distribute copyrighted sound recordings and motion pictures without permission – and without paying for them. Virtually all those who use Grokster and StreamCast are committing unlawful copyright infringement, and they commit millions of acts of infringement each day. Grokster and StreamCast exploit this massive infringement for profit, and petitioners are suffering extreme harms as a consequence.

The question is whether Grokster and StreamCast will be held responsible for their conduct under well-established principles of copyright liability, or whether they have a perpetual free pass to inflict these harms because a tiny fraction of the material available on their services may not be infringing. The Court's decision in *Sony Corp. of America v.*

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[1] Statement of the Hon. Marybeth Peters, Register of Copyrights, Before the Senate Comm. on the Judiciary, 108th Cong. (Sept. 9, 2003) (Pet. App. 65a-66a).

Universal City Studios, Inc., 464 U.S. 417 (1984) ("*Sony-Betamax*"), held that the manufacturer of copying equipment used principally for legitimate noninfringing purposes could not be held liable for its customers' incidental infringing uses of that equipment. *Sony-Betamax* does not, however, absolve Grokster and StreamCast of liability, as the Ninth Circuit believed. To the contrary, *Sony-Betamax* calls for a balance between "effective – and not merely symbolic – protection" of copyright, and "the rights of others freely to engage in substantially unrelated areas of commerce." *Id.* at 442. Ignoring the need for balance, the Ninth Circuit denied petitioners any possibility of "effective protection" of their copyrighted works in the digital era, while shielding enterprises that profit directly from brazen expropriation of the value of those works.

A. Factual Background

1. Grokster and StreamCast run infringement-driven businesses. Exploiting widely available "peer-to-peer" technology, these companies created, maintain, and profit from Internet-based services that offer users a vast array of copyrighted sound recordings and motion pictures without permission for free. Users of the Grokster or StreamCast services can search the computer files of other users ("peers") connected to the service and, with a few simple clicks of a computer mouse, copy any desired work from the available files of the other users (hence the name "peer-to-peer"). *See* J.A. 246-63. Technology that enables peer-to-peer distribution has existed for years. Although the technology can be used for lawful exchanges of digital files, that is not how Grokster and StreamCast use it. They run businesses that abuse the technology. At least 90% of the material on their services is infringing, and that infringement

occurs millions of times each day. Pet. App. 4a; J.A. 439.[2] The services are breeding grounds for copyright infringement of unprecedented magnitude – infringement that would not occur if Grokster and StreamCast did not make it possible.

Copyright infringement is the lifeblood of these businesses. The availability of free copyrighted sound recordings and motion pictures (for which users would otherwise have to pay) is what uniquely attracts users to Grokster and StreamCast. Pet. App. 50a (district court finding that users are lured "because of the ability to acquire copyrighted material free of charge").[3] Each new user adds digital files to the stock of copyrighted works that can be copied and distributed, increasing the selection and volume of infringing material available, and making respondents' services still more attractive to other potential users.

Grokster and StreamCast "depend[] upon this infringement" to make money. *Id.* They do not sell the specially designed software needed to gain access to the vast array of copyrighted material available through their services. Rather, they give away their software to build their networks of anonymous users, and then profit by selling advertising that they display to the millions of users committing infringement on the services. *Id.* Each time a user connects

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[2] Respondents concede that unauthorized copying and distribution of copyrighted works over a peer-to-peer service is direct infringement. Pet. App. 31a. That is also the conclusion of every court to have ruled on the issue. *See, e.g., A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 911-16 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001); *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634, 648-49 (N.D. Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004).

[3] To the extent a very small number of public domain works or copyrighted works that are authorized for free digital distribution are available on the networks, those works (which can be found for free elsewhere) are at best incidental to the services.

to the service to search for copyrighted content, Grokster and StreamCast pump advertising to the user's computer screen. *See, e.g.*, J.A. 258, 458. The greater the number of users connected to respondents' services, the more money respondents make. As StreamCast has explained, "the core value of a peer-to-peer network [is] the network itself" and not the technology that forms it. J.A. 880. Copyright infringement is what builds and sustains the Grokster and StreamCast networks, and thus what creates value for respondents – to the tune of millions of dollars of annual advertising revenue. Pet. App. 49a-50a.

Because so many people have joined Grokster and StreamCast, virtually all popular sound recordings and motion pictures are available for free on the services, *see, e.g.*, J.A. 205-09, 173-74, threatening legitimate markets for those works, *see infra* at 12-14. Grokster and StreamCast users need never again buy a CD or DVD, or log on to legitimate on-line services such as Apple's iTunes or Movielink, to purchase desired works in digital form.

2. Grokster's and StreamCast's services are designed so that users can easily and anonymously connect with like-minded infringers. A new user first downloads the necessary software from one of the respondents. Once the software is installed and launched, the user is connected both to respondents' central computers and to other users of the service – typically millions of people at a time – to search for, copy, and distribute copyrighted works stored on other users' computers. Respondents' software creates a "share" folder on each user's computer to contain the files the user downloads from the service, which are then automatically available for copying by other users. J.A. 253. Moreover, to enable users to search the computers of complete strangers, respondents' software scans the "share" folders of those connected to the network, extracts information from each user's files, and automatically creates indices of the sound

recordings, motion pictures, and other works available for copying and distribution. J.A. 253, 461-63.

Whenever users access the services, "prompts" appear on the users' computer screens to facilitate searches for desired songs, movies, or other content. For example, the software directs users to search for "audio files" by artist, song title, album title, or music category (such as "Top 40"). Pet. App. 27a; J.A. 734-35, 1015. Similar prompts guide users seeking video files. J.A. 252-53. A user who wants recordings by Bruce Springsteen or the movie *The Godfather* simply types the artist's name or the film title in the appropriate search prompt and clicks a search button. Within seconds, the service searches the indices and returns a list of copies of the desired work that are available to copy. *Id.*

To obtain a copyrighted work, the user clicks on an entry from the list of search results. The service then automatically retrieves a perfect digital copy of the desired song or movie from the computers of one or more other users. In a short time, the copying user has a new, permanent copy that he or she can listen to or view as often as desired. *Id.* Each time a Grokster or StreamCast user makes an unauthorized copy, that copy immediately becomes available on the copying user's computer (and remains available on the computers of the users from whom the copy was made) to be copied and distributed further by others – resulting in an exponentially multiplying (or "viral") creation and redistribution of perfect digital copies. Pet. App. 27a; J.A. 250-51.

In addition to this web-like connection among network users, respondents' services forge an ongoing hub-and-spoke connection between each user and Grokster or StreamCast. J.A. 465. The latter connection enables respondents to display advertising on their users' computer screens whenever the users are connected to the system. Pet. App. 41a, 50a; J.A. 257-58, 261. It also allows respondents to

manage and modify their networks to preserve and enhance the unauthorized exchange of copyrighted material. J.A. 263-79, 447-61 (describing how StreamCast's central computer communicates hourly or daily with each user's computer). Grokster and StreamCast use this link to provide frequent software modifications and updates (ranging from routine maintenance to complete network overhauls) to make copying and distribution faster and more reliable. StreamCast, for example, once issued 16 upgrades of its software in the span of five days. J.A. 261.

3. By design, Grokster and StreamCast are used overwhelmingly for infringement. Both businesses patterned themselves after Napster, the first infringement-driven service that used peer-to-peer technology. As respondents' founders knew, Napster was sued to stop the infringement occurring on its service, resulting in a preliminary injunction compelling Napster to block infringing material. *See A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

Seizing the moment, Grokster and StreamCast launched alternative peer-to-peer services "so that when Napster pulls the plug on their free service (or if the Court orders them [to] shut down prior to that), we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative." J.A. 861. In targeting Napster users, Grokster and StreamCast intentionally sought a user base engaged in proven copyright infringement on a massive scale. *See A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902-03 (N.D. Cal. 2000) (finding that "virtually all Napster users download or upload copyrighted files and that the vast majority of the music available on Napster is copyrighted"), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

The two companies directly courted Napster's infringing users. StreamCast, then doing business as MusicCity.com,

promoted itself as "The #1 Alternative to Napster" and used the slogan: "When the lights went off at Napster . . . where did the users go? MusicCity.com." J.A. 836; *see also* J.A. 834-35 (banner ad describing StreamCast as the "most reliable alternative service to Napster"). Grokster derived its name from Napster and then inserted the word "Napster" into its website's "metatags" – digital codes that are invisible to the user but visible to search engines such as Yahoo! or Google – so that individuals searching the Internet for "Napster" would be directed to Grokster. J.A. 992-93.[4] And respondents designed their services so that, from the user's perspective, Grokster and StreamCast operate identically to Napster, differing only in the greater variety of their offerings, which include motion pictures, video games, and other digital copyrighted works, in addition to the sound recordings that fueled Napster.

After their initial launch, Grokster and StreamCast remained focused on attracting and retaining infringing users by maximizing the copyrighted material available on their services. StreamCast's executives even searched their service for copyrighted works, measuring success by the availability of such works. J.A. 868 (complaint from StreamCast Chairman that more Garth Brooks songs were available on a competitor's service). Respondents' promotional materials boasted of the availability of copyrighted music from popular artists. *See, e.g.*, J.A. 936 (promotional materials stating that StreamCast searches resulted in more Madonna songs than did searches on other services); J.A. 843-57 (same for Sting); J.E.R. 911-24 (Grokster newsletters with links to articles lauding ability to

[4] Similarly, when AudioGalaxy, another Napster clone, announced it would begin blocking infringing works, Grokster released an "AudioGalaxy migration tool" to make it easy for disappointed AudioGalaxy users to move with their infringing files to Grokster. J.A. 199, 287.

find "Best of Elvis Costello" and "Sonny and Cher"); J.E.R. 713.02-.06, 713.11-.12 (StreamCast web page highlighting articles about wide range of copyrighted materials available through the StreamCast service); J.A. [redacted]87-90 (StreamCast media kit including similar articles); J.A. 923-24 (promotional screen shots showing availability of musical works by The Eagles); J.A. 821-26 (same).[5] Respondents' technical support personnel urged users to add more infringing content to the network, *e.g.*, J.A. 808 (response to user seeking more works by the Beatles and other artists: "Maybe you should load some up"), and gave users advice on how to copy specific infringing works, including popular movies such as the *Lord of the Rings* trilogy, *The Matrix*, *Moulin Rouge*, and many others, *e.g.*, J.A. 809-17, 820, 941-54. Grokster and StreamCast hosted on-line forums and "chat rooms" in which users discussed downloading copyrighted works. *E.g.*, J.E.R. 888-900. Respondents also prevented copyright owners from accessing the network to detect and prevent infringement by blocking the Internet Protocol ("IP") addresses of petitioners' law firm and another firm that polices the Internet for copyright piracy. J.A. 272.[6]

Grokster and StreamCast were well aware of the massive infringement on their systems. Pet. App. 36a. Petitioners sent respondents notices identifying by file name, user name, and IP address "over 8 million infringing files available on their systems," which "represent infringement of more than 80,000 different sound recordings." *E.g.*, J.A. 205. Ignoring the notices, Grokster and StreamCast continued to provide

[5] Citations to the "J.E.R." refer to the Joint Excerpts of Record filed with the court of appeals.

[6] StreamCast also told users that its service was "ENCRYPTED to protect privacy," J.A. 870-71, and explained to its advertising agency that such encryption prevents copyright owners from monitoring infringement on StreamCast's network. J.A. 753-56.

the software, updates, and network maintenance needed for new users to join and old users to access the services.

4. Although Grokster and StreamCast offer the same service as Napster, they differ from Napster in one technological detail that is immaterial to their businesses but that led the Ninth Circuit to immunize them from copyright liability. Grokster and StreamCast use decentralized indices of available files, while Napster had a centralized index. Initially, Grokster and StreamCast maintained indices on central computer servers they owned and operated – just as Napster had. J.A. 250-51. After Napster was held liable for infringement based in part on operating a centralized index, respondents' counsel published a legal "primer" in which he advised that, to avoid liability, peer-to-peer services should create "plausible deniability" by "choos[ing] an architecture that will convince a judge that . . . monitoring and control is impossible." Fred von Lohmann, *IAAL: Peer-to-Peer File Sharing and Copyright Law After Napster* (2001), *at* http://www.gtamarketing.com/P2Panalyst/VonLohmann-article.html. Consistent with that advice, Grokster and StreamCast reprogrammed their software to outsource the indexing function to user computers on the network, and then "migrated" their users – and all of their infringing content – to the new system. J.A. 253, 531-32, 591, 828.[7]

[7] When this case was filed, both Grokster and StreamCast operated on the "FastTrack" network, which creates and stores indices on selected users' computers (called "supernodes"). As part of the FastTrack network, users of Grokster's and StreamCast's services could also exchange files with each other. J.A. 251-52. The FastTrack software was licensed from Kazaa B.V. (a codefendant that appeared in the district court and then defaulted). After a license dispute, Kazaa blocked all StreamCast users from the FastTrack network. J.A. 258-59. StreamCast then transferred its user base to a peer-to-peer network called "Gnutella," using software that StreamCast repeatedly updates. Some versions of StreamCast's software create "ultrapeers" – which perform functions similar to supernodes – while other versions do not, resulting in a mix of indexing

That change did not transfer control over the indexing function to the users who host it. Respondents still control how and where the indices are created and update the indexing process. They merely foist the task of storing this information on user computers that meet certain criteria, such as adequate storage space, processing speed, and broadband connection to the Internet. J.A. 254-55. Users whose computers are commandeered for this purpose are almost never aware of the role they have been conscripted to play.

5. Grokster and StreamCast also took other steps to create "plausible deniability" about their ability to monitor or prevent infringement. Before petitioners brought suit, Grokster and StreamCast required users to log in to the networks through their central servers using a unique user name and password, as is common practice for Internet services. This feature allowed respondents to control access to their services and to terminate the accounts of known infringers by deleting their user names, changing their passwords, or blocking their IP addresses. J.A. 667, 780-83, 1096. After Grokster and StreamCast were sued, however, they eliminated the log-in feature, thereby disabling a readily available (albeit imperfect) tool for excluding infringing users. J.A. 271, 954.[8]

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on ultrapeers and indexing decentralized to all computers on the network. J.A. 261; J.E.R. 2628.

[8] The district court incorrectly stated that a user could access the services even after deletion of his or her user name from Grokster's or StreamCast's log-in server. Pet. App. 43a n.7. The court drew that erroneous inference from evidence that when Grokster's or StreamCast's log-in server *was not operational* users could still access the system (even if their user names and passwords were not valid). *Id.* But that does not contradict the evidence cited above showing that when the central log-in server *was* operational it would block access to the service unless a user entered a valid user name and password. *See* J.A. 664-67.

At the outset of this litigation, Grokster and StreamCast also required users to enter into license agreements that gave respondents the right to terminate a user's access to their services "upon any single act of infringement in conjunction with the use of" the services. J.A. 345, 1006. Grokster's licensing agreement also authorizes it to "add, delete or change some or all of our services provided in connection [with] Grokster at any time. This may include download of necessary software modules." J.A. 340. StreamCast's agreement has a similar provision. J.A. 1001. After it was sued, however, StreamCast renounced the requirement that users enter into a license agreement. J.A. 90.

Although they are in constant contact with their users and have upgraded their software many times, Grokster and StreamCast have chosen not to implement available technologies that would block or filter infringing content on their networks. Several vendors offer fast, efficient commercial technologies capable of taking a digital file's "fingerprint," comparing it against a master database, and disapproving the transfer of the file if it is infringing. These technologies are already in use in other commercial applications, such as monitoring radio broadcasts for copyright holders. *See* J.A. 183, 228-29. The evidence showed that filtering technologies could be effectively employed with respondents' services. J.A. 181-88, 224-32, 279-85. StreamCast's former Chief Technology Officer confirmed that "there are no technical limitations to the ability to filter" (and thereby eliminate) infringing content, and that "the question is not whether file-sharing companies can filter, but whether they will."[9]

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[9] Darrell Smith, *The File-Sharing Dilemma*, C-Net News, Feb. 3, 2004, *at* http://news.com.com/The+file-sharing+dilemma/2010-1027_3-5152265.html; *see also* J.A. 1162. Respondents disputed their ability to block infringing files, and Grokster claimed that it lacked the power to do so because it is a mere licensee without access to the underlying "source

Respondents avoid filtering because it is inconsistent with their strategy of plausible deniability. As one StreamCast employee noted, filtering is "a technology that will allow [us] to see what our users are sharing . . . [and] I know this is something we DO NOT want to do." J.A. 928. Filtering is also incompatible with respondents' business model, as it would dry up the infringing content that draws users to their services. In sharp contrast, where it benefits their business interests, Grokster and StreamCast have implemented filters – to eliminate files with "viruses," "bogus" files that are not the works they purport to be (and which thus discourage or disrupt downloading of copyrighted works), and some pornographic files. J.A. 274-75.

6. Respondents' services inflict massive and irreparable harm because of the viral distribution they make possible. A copyrighted motion picture or sound recording in digital form – unlike prior media such as videotapes – can be copied and disseminated, swiftly and without degradation, an infinite number of times. *See generally* S. Rep. No. 105-190, at 8 (1998). Grokster and StreamCast exploit this characteristic of digital copyrighted works.

As a result, piracy of sound recordings has reached epidemic proportions. By some estimates, more than 2.6 billion infringing music files are downloaded each month. *See* Lev Grossman, *It's All Free*, Time, May 5, 2003. Empirical studies confirm that services like respondents' have caused a sharp decline in sales of music. *See, e.g.*, Simon Dyson, Informa Media Group Report, *Music on the Internet* 25 (4th ed. 2003) (estimating losses in the range of

code" for the software that is the backbone of its system. But petitioners' evidence showed that blocking was feasible for services such as Grokster's even *without* access to the "source code." *See* J.A. 425-33, 1162 (Q: "And you could have done [filtering] without the . . . source code? A: That's correct").

$700 million to several billion dollars annually).[10] Shipments of the "Top 10" popular albums dropped 50% over a three-year period.[11] The motion picture industry suffers as well, with as many as 400,000 feature-length motion pictures – many of which are still in theaters – unlawfully downloaded each day.[12] The damage will only grow as increased bandwidth allows users to transfer files more quickly.

Grokster and StreamCast also inflict a more insidious form of harm. Their services breed a culture of contempt for intellectual property, and for the rights of others generally, in cyberspace. *See In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003) (describing "swappers, who are . . . disdainful of copyright"), *cert. denied*, 540 U.S. 1107 (2004). Respondents and those like them reinforce the notion that the direct infringement on their services is unobjectionable by proclaiming that the services are "100% Legal!" Pet. App.

[10] *See also, e.g.*, Stan J. Leibowitz, *File-Sharing: Creative Destruction or Just Plain Destruction?* 32 (Dec. 2004) (showing "significant harm to the recording industry" and a clear substitution effect); Stan J. Liebowitz, *Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far, in Intellectual Property and Entrepreneurship* 229 (Gary D. Libecup ed. 2004).

[11] *Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Senate Comm. on Governmental Affairs*, 108th Cong. (Sept. 30, 2003) (statement by Mitch Bainwol, CEO, RIAA), *available at* http://hsgac.senate.gov/index.cfm?Fuseaction=Hearing.Tetimony&HearingID=120witnessID=414.

[12] *See* Fiona Vanier, *Piracy Costing Industry $3.5 Billion a Year*, Screen Finance, July 2, 2003 (noting that "Deloitte & Touche estimates that up to 400,000 features are being downloaded from the Internet in the USA every day"); *see also DRM: The Consumer Benefits of Today's Digital Rights Management Solutions, Hearing Before the Subcomm. on Court, The Internet and Intellectual Property, of the Comm. on the Judiciary*, 107th Cong (June 5, 2002), *available at* http://commdocs.house.gov/committees/judiciary/hju80031.000/hju80031_0f.htm.

83a; *see id.* at 75a-85a.[13] Respondents thus erode not only the public perception of the value of sound recordings, musical compositions, and motion pictures, but respect for the very foundations of copyright law in the digital age.

B. Proceedings Below

In October 2001, petitioners – the major motion picture studios and record companies, later joined by a certified class of 27,000 music publishers and songwriters – sued for damages and an injunction against continuing infringement on the Grokster and StreamCast services.

Petitioners sought relief under two established doctrines: "contributory infringement," which provides for liability where "one . . . with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another," *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (footnote omitted), and "vicarious liability," which provides for liability where the "beneficiary" of "the exploitation of copyrighted materials" has "the right and ability to supervise coalesce[d] with an obvious and direct financial interest in the exploitation," *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963). Petitioners submitted evidence showing that at least 90% of the activity on the Grokster and StreamCast services was infringing; that respondents well knew of this massive infringement; that they created, designed, and expanded the services to encourage infringement; that they obtained a direct financial benefit from the infringement; and that they had ample right and ability to prevent the infringing uses while preserving the noninfringing uses (if any) of their services.

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[13] *See also* Lior Jacob Strahilevitz, *Charismatic Code, Social Norms and the Emergence of Cooperation on the File-Swapping Networks*, 89 Va. L. Rev. 505, 581-82 (2003); Tim Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 722-26, 745 (2003).

Despite this evidence, and relying on this Court's decision in *Sony-Betamax*, the district court granted summary judgment for respondents, finding their current services lawful. Pet. App. 23a-56a.

On appeal, the Ninth Circuit recognized that Grokster and StreamCast "enable[] the user to participate in the respective peer-to-peer file-sharing networks," *id.* at 7a; that on their networks "the vast majority of the files are exchanged illegally in violation of the copyright law," *id.* at 8a; and that Grokster and StreamCast profit directly from that infringement, *id.* at 16a. Nonetheless, motivated by the apparent belief that any kind of "innovation" is good, even when it is based on "market abuses" of great magnitude, *id.* at 21a, the court affirmed.

The Ninth Circuit's contributory infringement analysis was premised on its reading of *Sony-Betamax*. *Id.* at 11a, 12a. In that case, the Court held that the manufacturer of a video recording device – the Betamax – was not a contributory infringer based on the mere sale of the product with constructive knowledge that it *could* be used for infringing purposes, because the primary use of the Betamax did not in fact involve copyright infringement. 464 U.S. at 421, 423; *id.* at 442 (Betamax was "widely used for legitimate, unobjectionable purposes").

In the Ninth Circuit's view, *Sony-Betamax* rendered irrelevant that at least 90% of the materials on Grokster's and StreamCast's services are infringing. Pet. App. 11a. The court thought the only issue was whether the services might be put to noninfringing uses. Relying on anecdotal evidence that some noninfringing material was available on respondents' services (or on the Internet generally), the Ninth Circuit held that the services were "capable of substantial non-infringing uses" and stated without analysis that these noninfringing uses have "commercial viability." *Id.* at 12a.

Having found "substantial noninfringing uses," the Ninth Circuit formulated a new test for contributory infringement, holding that Grokster and StreamCast could be liable only if they "had specific knowledge of infringement at a time at which they contribute[d] to the infringement and fail[ed] to act upon that information." *Id.* at 13a (quotation marks omitted). The court thus ignored the evidence that Grokster and StreamCast intended to contribute to infringement and had engaged in conduct encouraging and assisting it.

According to the Ninth Circuit, respondents did not have the kind of knowledge required by the court's test. Although Grokster and StreamCast had received many notices of specific infringements, the court believed respondents could not have "acted upon this information" because by the time they received the notices, they had completed the primary actions that facilitate the infringement (*i.e.*, setting up the services). *Id.* The Ninth Circuit found it irrelevant that respondents deliberately and affirmatively disabled existing legal and practical mechanisms for controlling infringement and avoided other readily available measures to block infringement. *Id.* at 13a, 18a.

A similar analysis led the Ninth Circuit to reject vicarious liability. Despite finding that the "elements of direct infringement and a direct financial benefit, via advertising revenue, are undisputed in this case," *id.* at 16a, the court believed that Grokster and StreamCast could not supervise or control the infringement on their services. Again, the court found irrelevant that Grokster and StreamCast had intentionally tried to divest themselves of the very means to supervise or control infringement, *id.* at 18a, and that they could readily supervise or control infringement by filtering infringing files, *id.* at 20a.

SUMMARY OF ARGUMENT

As this Court recognized in *Sony-Betamax*, the doctrines of contributory infringement and vicarious liability are a vital part of the protection the law affords copyright owners. *See* 464 U.S. at 435, 437 & n.18. Properly applied, these doctrines "strike a balance between a copyright holder's legitimate demand for effective – not merely symbolic – protection" and "the rights of others freely to engage in substantially unrelated areas of commerce." *Id.* at 442.

The Ninth Circuit broke faith with that central tenet of *Sony-Betamax* when it held that Grokster and StreamCast bear no legal responsibility for the millions of acts of infringement made possible by their services. The court afforded no protection whatsoever to petitioners' copyrights in the creative works unlawfully reproduced and distributed on respondents' services every day. And the court immunized enterprises that are not engaged in legitimate "unrelated areas of commerce" but thrive on infringement. The Ninth Circuit acted in the misguided belief that respondents' "market abuses, despite their apparent present magnitude," must be tolerated in order to avoid chilling "innovation." Pet. App. 21a. But *Sony-Betamax* requires balance. It is not a free pass for "market abuses." To the contrary, as *Sony-Betamax* itself makes clear, respondents are liable under established law.

Contributory Infringement. Grokster and StreamCast are liable as contributory infringers because they have "knowledge of the infringing activity" on their services and they "induce[], cause[] or materially contribute[] to" that infringing activity in myriad ways. *Gershwin*, 443 F.2d at 1161-62 (footnote omitted). Neither proposition can be seriously disputed. Despite their efforts to achieve plausible deniability, respondents know full well that their services are rife with infringing activity. And they materially contributed

to that infringement by creating, maintaining, and expanding their services, which make possible the infringement that could not otherwise occur. While that conduct alone establishes material contribution, respondents did much more. They intended to bring about this massive infringement and actively encouraged and assisted it in many ways – from promoting themselves as sources of infringing content to deliberately disabling and avoiding mechanisms that would limit infringement.

Although *Sony-Betamax* provides a defense to contributory infringement where the defendant sells a staple article of commerce that may be used to infringe but also has commercially significant noninfringing uses, 464 U.S. at 442, Grokster and StreamCast cannot avail themselves of that defense, for two independent reasons.

First, *Sony-Betamax* provides no safe harbor where, as here, a defendant engages in conduct that encourages or assists infringement, or intends to facilitate it. Immunizing such conduct would be impossible to square with fundamental principles of copyright and patent law on which the Court relied in *Sony-Betamax*. *See, e.g.*, *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62-63 (1911); 35 U.S.C. § 271(b), (c). The existence of commercially significant noninfringing uses is not a license to use a product or service to promote infringement.

Second, and in all events, the Grokster and StreamCast services lack "commercially significant noninfringing uses." In *Sony-Betamax*, the principal use of the equipment was lawful, noninfringing "time-shifting" of television programs that the copyright owners offered to viewers for free. In vivid contrast, respondents' services are used principally (indeed, overwhelmingly) for infringing reproduction and distribution of works that users would otherwise have to pay to obtain. Where a service is used principally for

infringement, it is not involved in a "substantially unrelated" line of commerce. 464 U.S. at 442. Infringement *is* its business, and *Sony-Betamax* does not provide it immunity. In addition, there is no conceivable reason for immunizing a product or service used principally for infringement when, as in this case, the defendant could prevent infringing uses while allowing noninfringing uses to continue. In such circumstances, providing effective protection for copyrights will not impede legitimate commerce.

The Ninth Circuit's contrary conclusions rest on a fundamental misunderstanding of *Sony-Betamax* as rendering irrelevant the undisputed evidence that Grokster and StreamCast actively encouraged and assisted infringement, and that their services were used principally for infringement. What mattered, in the Ninth Circuit's view, was that the services were merely capable of noninfringing use. Finding *Sony-Betamax*'s staple article of commerce defense applicable on that basis, the Ninth Circuit created and applied heightened standards for knowledge and material contribution. Neither the Ninth Circuit's "mere capability" test nor its other novel standards find support in precedent or common sense. The Ninth Circuit's approach creates a safe harbor for enterprises like Grokster and StreamCast that dismantle or avoid measures that can be used to limit infringement, which perversely encourages such efforts to defeat copyright enforcement, and disadvantages businesses that seek in good faith to prevent violations of copyright holders' rights.

Vicarious Liability. Grokster and StreamCast are also liable under established vicarious liability principles. "When the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials," settled law imposes liability "upon the beneficiary of that exploitation." *H.L. Green*, 316 F.2d at 307. Here, it is undisputed that Grokster and StreamCast

benefit in an obvious and direct way from the exploitation of copyrighted materials. They operate on-line bazaars for the unlawful distribution of copyrighted music and movies; users are drawn to the services by the free availability of such materials; and respondents' advertising profits rise in direct proportion to the number of users they attract. It is equally clear that Grokster and StreamCast have the right and ability to supervise or control infringement on their services, but have deliberately tried to shed all legal and practical means of doing so. The Ninth Circuit's refusal to hold respondents liable rests on its mistaken view that they should be absolved insofar as they succeeded in disabling or avoiding the means to supervise or control infringement – a view that is precisely the opposite of established law.

In short, there are multiple and overwhelmingly strong legal grounds for imposing liability on Grokster and StreamCast. The Ninth Circuit's decision granting summary judgment in favor of respondents on all grounds cannot possibly be sustained. Indeed, under a proper understanding of established law, the undisputed facts require summary judgment to be granted in favor of petitioners. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Doing so is entirely consistent with *Sony-Betamax* because it ensures "effective protection" of copyright in the digital age, 464 U.S. at 442, and poses no threat to legitimate noninfringing commerce. It is the Ninth Circuit's rule that threatens innovation – not only in artistic creation but also in software design (which copyright protects), as well as in the efforts of legitimate businesses to distribute copyrighted content in digital form on the Internet, through wireless services, or by satellite, cable and other means. Finally, reversing the Ninth Circuit is necessary to restore a climate of appropriate respect for intellectual property on the Internet, thereby preserving the "economic incentive to create

and disseminate ideas," and ensuring that copyright remains the "engine of free expression" the Framers intended. *See Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

ARGUMENT

The copyright law doctrines of contributory infringement and vicarious liability play a critical role in protecting the exclusive rights of copyright owners to control the exploitation of their works. *See Sony-Betamax*, 464 U.S. at 442; *see also id.* at 435, 437 & n.18. Creative works are particularly vulnerable to expropriation in the absence of effective legal protection.[14] As the Court has recognized, legal protection – if it is to be more than symbolic – must reach not only those who directly expropriate a copyright owner's exclusive rights, but also, in suitable circumstances, those whose "products or activities . . . make such [infringing conduct] possible." *Id.* at 442; *see Kalem*, 222 U.S. at 62-63; *Herbert v. Shanley Co.*, 242 U.S. 591, 594-95 (1917).[15]

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[14] William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach*, 9 Geo. Mason L. Rev. 1, 5 (2000) ("Creating [original] works involves a good deal of time, money and effort. . . . Once created, however, the cost of reproducing the work is so low that additional users can be added at a negligible or even zero cost. . . . It follows that in the absence of copyright protection, unauthorized copying or free riding on the creator's expression would tend to drive the price of copies down to the cost of making them. But then the party who expended the resources to create the work in the first place will be unable to recover his costs. Hence, the incentive to create new works will be significantly undermined without protection against unauthorized copying").

[15] Congress's comprehensive re-enactment of the copyright laws in 1976, and its enactment of the Digital Millennium Copyright Act (DMCA) in 1998, ratified the established understanding under the Copyright Act of 1909 that "infringement" encompasses secondary as well as direct liability. *See Sony-Betamax*, 464 U.S. at 435; *H.L. Green*, 316 F.2d at 307; *Gershwin*, 443 F.2d at 1161. *See generally Reno v. Koray*, 515 U.S.

It is thus both "manifestly just" and central to copyright law's goal of "stimulat[ing] artistic creativity for the general public good" to place "responsibility where it can and should be effectively exercised." *Sony-Betamax*, 464 U.S. at 432, 437 n.18 (quotation marks omitted). Copyright law has therefore always imposed liability on "gatekeepers" or intermediaries that facilitate infringement. The prospect of liability gives gatekeepers an appropriate incentive "to police carefully" against direct infringement, and counterbalances the prospect of financial gain from facilitating it. *Id.* at 437 n.18 (quoting *H.L. Green*). Without recourse against gatekeepers, copyright holders would be left with what is often – as here – the impractical and inadequate option of pursuing a multitude of individual infringers. *Aimster*, 334 F.3d at 645; *see also Dawson Chem. Co. v. Rohm & Hass Co.*, 448 U.S. 176, 188-89 (1980). *See generally* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984). As the Register of Copyrights explained:

> secondary liability doctrines are critical to the effective functioning of our copyright system, and even more so in the new digital environment. They allow copyright owners to focus their enforcement (and licensing) efforts on those entities that foster infringing activity and have the resources and wherewithal to either pay licensing fees or satisfy an infringement judgment, without bringing costly, time-consuming and usually futile actions against multiple, mostly judgment-proof individual defendants.[16]

50, 59-60 (1995); *Warner-Jenkinson Co. v. Hilton-Davis Chem. Co.*, 520 U.S. 17, 28 (1997). The doctrines were expressly recognized in the 1976 Act, *e.g.*, 17 U.S.C. §§ 106, 108(f)(1), 110(6); H.R. Rep. No. 94-1476 at 61, 159-60 (1976); S. Rep. No. 94-473 at 57, 141-42, 159-60 (1975), and in the DMCA, *e.g.*, 17 U.S.C. § 1201(c)(2); *id.* § 512(a)-(d); *see also* H.R. Rep. No. 105-551(II) at 64 (1998).

In *Sony-Betamax*, the Court endorsed these principles, 464 U.S. at 435 n.17, 437-39, and recognized that they must reflect a balance between effective copyright protection and the rights of others to engage in substantially unrelated areas of legitimate commerce. *Id.* at 442. There, the Court concluded that Sony was not liable for selling a device that some purchasers might use to infringe copyrights in television programs. The dispositive factor was that the Betamax's "primary" use was for "time-shifting," which the Court determined was lawful fair use and not infringement. *Id.* at 421, 423, 442, 447-56.

Grokster's and StreamCast's services are the polar opposite of the Betamax. Grokster and StreamCast built and run services that are principally used for infringement, and it is this infringement – not legitimate activity – that makes them money. Established doctrines of contributory infringement and vicarious liability require that Grokster and StreamCast be held responsible for their conduct.

I. Grokster And StreamCast Are Liable As Contributory Infringers.

A. Grokster and StreamCast Knowingly Contribute to Massive Copyright Infringement.

Grokster and StreamCast have "induce[d], cause[d,] [and] materially contribute[d] to the infringing conduct" of their users "with knowledge of the infringing activity." *Gershwin*, 443 F.2d at 1162 (footnote omitted). Thus, unless liability is

[16] *The Intentional Inducement of Copyright Infringements Act of 2004: Hearing on S. 2560 Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (statement of Hon. Marybeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat072204.html (visited Jan. 23, 2005).

precluded by the *Sony-Betamax* defense (which it is not, *see infra* at 26-38), Grokster and StreamCast are liable as contributory infringers, based on the principle that "one who knowingly participates in or furthers a tortious act is jointly and severally liable with the prime tort-feasor." *Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc.*, 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (Weinfeld, J.); *see also, e.g., Aimster*, 334 F.3d at 645-46 ("the law allows a copyright holder to sue a contributor to the infringement . . . in effect as an aider and abettor").

The undisputed evidence establishes that Grokster and StreamCast have always known about the massive infringement occurring daily on their services. A court had already ruled that "virtually all" of the Napster users targeted by respondents were infringers. *Napster*, 114 F. Supp. 2d at 902-03. Grokster and StreamCast received notices from petitioners identifying at least eight million copies of eighty thousand separate copyrighted works on their services. Senior executives monitored the services and the availability of infringing works, and support personnel instructed users how to download infringing works.[17]

The undisputed evidence also establishes that Grokster and StreamCast induced, caused, and materially contributed to this infringement. Under well-established law, such contribution can take two forms: (1) provision of a device or service that makes infringement possible, and (2) active encouragement or assistance of infringement. 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*

[17] Despite this undisputed evidence of knowledge, the Ninth Circuit concluded that Grokster and StreamCast lacked the requisite knowledge for contributory infringement. It did so by applying a novel and counterintuitive knowledge standard that imports timing and control requirements without any foundation in *Sony-Betamax*, established precedent, or common sense. *See infra* at 38-42.

§ 12.04[A][2], at 12-79 (2004); Paul Goldstein, *Copyright* § 6.1, at 6:6-6:7 (2d ed. 2004); *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 706 (2d Cir. 1998). Respondents' services (and others like them) are engines of infringement that millions of anonymous strangers use unlawfully to find, copy, and distribute perfect digital copies of copyrighted works for free. Those services did not spring up on their own. Grokster and StreamCast built them, maintain them, and work to expand them, knowing full well that they are used for massive infringement and little or nothing else. The unprecedented infringement on these services is occurring because Grokster and StreamCast have made it not merely possible but easy for their users to infringe. The creation and operation of the services constitutes material contribution under settled law, and standing alone justifies liability in the absence of a defense under *Sony-Betamax*. *See infra* at 30-38.

Grokster and StreamCast have, however, done much more than build and provide their services with knowledge that they are being used for infringement. They have actively encouraged and assisted their users' direct infringement. They deliberately set out to create services that would attract infringing users (first the Napster users and then others interested in joining networks of like-minded infringers). They expressly touted their services as alternatives to Napster and promoted the availability of copyrighted content. *Supra* 6-8. The services are tailor-made for media files – such as movies and music – that largely consist of copyrighted material, and the services automatically make all media files downloaded by a user available for copying by strangers whenever that user connects to the service. *Supra* at 4-5. Grokster and StreamCast also provide features – such as anonymity and encryption of network communications – that make users feel "safe" to infringe, and that hinder the efforts of copyright owners to identify infringers. *Supra* at 4-5, 8,

10. They actively maintain and upgrade their networks (including the software on users' computers) to provide the best possible environment for infringement. *Supra* at 5-6. They have incorporated filters that protect and promote infringing uses, such as filters to block "bogus" files that interfere with infringement. *Supra* at 12. Their promotional materials have used prominent and obviously infringing examples of popular music, and they have even advised specific users how to commit infringement. *Supra* at 7-8. And they have disabled or refused to adopt mechanisms that would allow them to terminate users who commit infringement or to prevent or limit the distribution of infringing files, making clear that their interest is in maximizing the infringing uses of the services. *Supra* at 10-12. That pattern of encouraging and assisting infringement far exceeds the minimum necessary to establish knowing and material contribution.

Indeed, Grokster and StreamCast have proceeded with the specific intent of inducing infringement. The deliberate goal of respondents' endeavors has been to maximize the availability of copyrighted works on their networks because that is what lures users by the millions and in turn allows respondents to increase their advertising revenues.

B. *Sony-Betamax* Does Not Shelter Grokster and StreamCast from Liability.

The effort by Grokster and StreamCast to find refuge in this Court's *Sony-Betamax* decision fails for two separate reasons. *First*, *Sony-Betamax*'s "staple article of commerce" defense does not apply where, as here, a defendant either intends to facilitate infringement or engages in conduct that encourages or assists it. *Second*, and in all events, the Grokster and StreamCast services do not have "commercially significant noninfringing uses" because those services are used principally for infringement.

1. Grokster and StreamCast Cannot Claim the Protection of *Sony-Betamax* Because They Intentionally Facilitated and Actively Encouraged and Assisted Infringement.

Sony-Betamax provides no defense when the defendant engages in conduct that encourages or assists infringement, or intends to facilitate it. Unlike the defendant in *Sony-Betamax*, Grokster and StreamCast have done far more than merely sell a product with the constructive knowledge that some buyers might put it to infringing use. They encouraged and assisted infringement at every turn. And they plainly acted with the intention of facilitating infringement. It is thus irrelevant whether their services have commercially significant noninfringing uses.

At the outset of its analysis in *Sony-Betamax*, this Court emphasized the district court's findings (after a full trial) that none of the defendants' conduct was designed to encourage or assist infringement. 464 U.S. at 438. Because liability could not be imposed on that basis, the Court turned to the question of whether liability could be based solely on the sale of the Betamax with the constructive knowledge that it could be used to infringe. *Id.* at 439. Limiting itself to that context, and analogizing to patent law, the Court observed that the staple article of commerce defense applies "[w]hen a charge of contributory infringement is predicated *entirely* on the sale of an article of commerce that is used by the purchaser to infringe." *Id.* at 440 (emphasis added). There, the Court balanced the interests of copyright holders and the "rights of others freely to engage in *substantially unrelated areas* of commerce." *Id.* at 442 (emphasis added). But where, as here, businesses specifically intend to facilitate infringement, or engage in conduct that encourages or assists the *infringing* uses of a product or service, they are not engaged in "substantially unrelated areas of commerce." They are engaged in, and profit from, infringement. *See*

Jesse M. Feder, *Is Betamax Obsolete*?, 37 Creighton L. Rev. 859, 862 (2004) (secondary liability exists to address businesses built "on the infringement of other people's copyrights").

This Court's copyright jurisprudence has long recognized the distinction between the mere sale of a product on the one hand and intending or actively encouraging and assisting infringement on the other. In *Kalem*, Justice Holmes noted that when contributory liability is based on the mere sale of an ordinary article of commerce, "nice questions may arise as to the point at which the seller becomes an accomplice in a subsequent illegal use by the buyer." 222 U.S. at 62. *Kalem* recognized, however, that "no such niceties are involved" when a sale is made "with a view to [an] illegal resale," or when the defendant "not only expected but invoked by advertisement" the infringing uses of its product. *Id.* at 62-63. Thus, where, as here, a defendant actively encourages and assists infringement, or intends that result, the defendant is liable based upon principles "recognized in every part of the law." *Id.* at 63.

Extending the staple article of commerce defense to the circumstances here would also be flatly inconsistent with the patent law to which *Sony-Betamax* analogized. Codifying long-standing case law, the Patent Act imposes liability for two types of contributory infringement: when the defendant "actively induces" infringement, 35 U.S.C. § 271(b),[18] or

[18] "Inducement" under § 271(b) of the Patent Act encompasses a wide range of conduct – "as broad as the range of actions by which one in fact causes, or urges, or encourage[s], or aids another to infringe a patent" – so long as there have been "active steps knowingly taken . . . , as distinguished from accidental or inadvertent." *Fromberg, Inc. v. Thornhill*, 315 F.2d 407, 411 (5th Cir. 1963); *see, e.g.*, Donald S. Chisum, *Chisum on Patents* § 17.04[4], at 17-87 (2004) (cataloging conduct constituting inducement, including licensing, repair and maintenance, design, instruction, and advertising of an item's infringing features).

when the defendant "sells . . . a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process," *id.* § 271(c); *see also, e.g.*, *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) ("the single concept of 'contributory infringement' [is] divided between" these two subcategories). The staple article of commerce defense applies only to the sale of a product. 35 U.S.C. § 271(c). Thus, the seller of a device that has substantial noninfringing uses, while absolved from patent liability under § 271(c), is nevertheless liable under § 271(b) "if, in addition to the sale of that product, active steps are taken to encourage direct infringement." *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1276 n.6 (Fed. Cir. 2004); *see also* Donald S. Chisum, *Chisum on Patents* § 17.04[4], at 17-87 (2004).[19]

Were the law otherwise, a business whose product or service has commercially significant noninfringing uses would have *carte blanche* to promote infringing uses aggressively, with no risk of liability. Enterprises would have an incentive not to limit but to maximize infringement, perversely turning *Sony-Betamax*'s narrow but important defense for products with widespread legitimate uses into a perpetual license to promote copyright infringement. No sensible liability rule would produce such results.[20]

[19] Similarly, as *Sony-Betamax* observed, 464 U.S. at 439, one who actively encourages or assists trademark infringement is liable for contributory infringement. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854-55 (1982).

[20] Not surprisingly, therefore, after *Sony-Betamax* courts and commentators (other than the court below) have unanimously recognized that where a defendant's conduct encourages or assists infringement, the fact that the defendant markets a product with substantial noninfringing

2. Grokster's and StreamCast's Services Do Not Have "Commercially Significant Noninfringing Uses."

Grokster and StreamCast are also ineligible for *Sony-Betamax*'s staple article of commerce defense for a second reason: their services lack "commercially significant noninfringing uses." *See* 464 U.S. at 439 n.19, 440-42.

1. *Sony-Betamax* variously stated the quantum of noninfringing use required to make out the staple article of commerce defense: "widely used for legitimate, unobjectionable purposes"; "capable of substantial noninfringing uses"; "commercially significant noninfringing uses." *Id.* at 442. But the Court declined to "give precise content to the question of how much use is commercially significant." *Id.* Instead, it held that the standard was satisfied in that case because the "primary use of the machine" – time-shifting – was noninfringing. *Id.* at 423, 442, 447-56; *see also id.* at 421 (Betamax used "principally" for time-shifting).

This case could not be more different. The Grokster and StreamCast services are used overwhelmingly for infringement, and not even respondents have tried to justify their users' copying and distribution as fair use. That rampant infringing use bears no resemblance to the time-shifting at issue in *Sony-Betamax*. The business of Grokster and StreamCast is the unlawful world-wide *distribution* of perfect digital copies of copyrighted music and movies

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uses is no defense. *See, e.g., Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 846-47 & n.30 (11th Cir. 1990); *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988); *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456-57 (C.D. Cal. 1996); Nimmer, *supra*, at 12-84 n.56, 12-88 n.75.4.

among strangers for free, resulting in viral redistribution. In contrast, distribution – of any scope – was not at issue in *Sony-Betamax*. 464 U.S. at 425. Moreover, and in further contrast to *Sony-Betamax*, the illegal reproduction and distribution of copyrighted works on respondents' services directly supplants petitioners' markets for the sale of those works, inflicting direct and obvious harm. *Supra* at 12-14.

The question presented on this record is thus the reverse of the question in *Sony-Betamax*: whether the smattering of claimed noninfringing uses that incidentally occur over respondents' services absolves them of the liability that otherwise follows from their knowing facilitation of massive infringement. The answer must be no.

Under the principles articulated in *Sony-Betamax*, the staple article of commerce defense should not apply when the primary or principal use of a product or service is infringing. Purveyors of products or services used principally for infringement are not engaged in "substantially unrelated" commerce under any sensible meaning of the term. Immunizing such businesses allows them to expropriate the value of copyrighted material that rightfully belongs to the copyright owner.

More fundamentally, permitting businesses to profit from products or services used primarily for infringement undermines the fundamental purpose of copyright protection without a countervailing benefit in any legitimate area of commerce. "The economic philosophy behind the [copyright] clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Eldred*, 537 U.S. at 214 (citation omitted). Thus, copyright's "ultimate aim" is to provide an "incentive to stimulate artistic creativity for the general

public good," and "the Copyright Act must be construed in light of this basic purpose." *Sony-Betamax*, 464 U.S. at 432 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)); *see also, e.g.*, *Eldred*, 537 U.S. at 219 (copyright "spur[s] the creation and publication of new expression"). Copyright protection also spurs technological innovation in areas like computer software development. Moreover, ensuring "effective protection" for copyright promotes innovation in the related areas of technology for authorized on-line and digital distribution of copyrighted works. *See infra* at 40-42. When businesses used principally for infringement are immunized, the protection of copyrights is "merely symbolic," and the powerful engine for creative effort and beneficial innovation is crippled.

As the Ninth Circuit recognized, on Grokster and StreamCast "the vast majority of the files are exchanged illegally in violation of the copyright laws." Pet. App. 8a. This undisputed fact establishes far more than what is needed to preclude respondents from invoking the staple article of commerce defense.

2. That conclusion is clinched by an additional consideration which – though not necessary to overcome the staple article of commerce defense – drives home why it should not apply here: The summary judgment evidence in this case showed that separating mechanisms are readily available that would block infringing uses while still permitting noninfringing file-sharing. *See supra* at 10-12.

Sony-Betamax adapted patent law's staple article defense to address the concern that imposing liability on manufacturers of products with commercially significant noninfringing uses might allow copyright owners to leverage their rights into control over the legitimate uses of the product. 464 U.S. at 440-41. But when infringing and noninfringing uses can be readily separated, so that

noninfringing uses can continue even when infringing uses are enjoined, the monopoly leveraging concerns that tipped the balance in *Sony-Betamax* are not implicated. In these circumstances, the right to engage in a "substantially unrelated area[] of commerce" is protected, *id.* at 442, and there is nothing to balance against the strong public interest in effective protection of copyrights. The Court's analysis in *Sony-Betamax*, therefore, leads to the conclusion that at least when the primary uses are infringing and can be readily blocked without significantly affecting lawful uses, liability is wholly appropriate. *See, e.g.*, *Aimster*, 334 F.3d at 653 ("to avoid liability as a contributory infringer the provider of the service must show that it would have been disproportionately costly for him to eliminate or at least reduce substantially the infringing uses"); Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 Harv. J.L. & Tech. 395, 398 (2003) (arguing that "liability is again attractive" when a business can "eliminate or greatly reduce the level of infringement without significantly cutting down on the quantity and quality of lawful uses").

This issue was not presented in *Sony-Betamax*, because it was impossible to eliminate the infringing uses of the Betamax while preserving its noninfringing uses. Rather, the only possible means of separation even suggested in that case involved blocking *all unauthorized* uses. That would have blocked more than infringing uses; it would also have blocked unauthorized time-shifting, which was both the primary use of the Betamax and found by the Court to be noninfringing. Thus, separation was not even a theoretical possibility in *Sony-Betamax*, and the Court faced an all-or-nothing choice: finding Sony liable would have deprived the public of the legitimate uses of the technology. *See* 464 at

440-41 & n.21.[21] "Once 'all or nothing' is no longer the only response the technology allows," however, "the legal rule should show similar flexibility." Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 Colum.-VLA J.L. & Arts 1, 37 (2000).

That all-or-nothing choice is not present here, because petitioners' evidence shows that there are readily available means for Grokster and StreamCast to separate infringing from noninfringing uses. *Supra* at 10-12. But the Ninth Circuit deemed that evidence irrelevant as a matter of law. For the Ninth Circuit, it was dispositive that Grokster and StreamCast had chosen not to incorporate the relevant technology into their systems – or had stripped it out. *Supra* at 10-12; Pet. App. 13a, 18a. That approach is fundamentally misguided, because it rewards infringement-driven services for the "innovation" of disabling a system's capacity to prevent infringing uses, irrespective of whether such innovation otherwise makes sense. *See infra* at 40-42 (discussing perverse incentives created by Ninth Circuit's approach). *Sony-Betamax* – which expressly recognized the justice of imposing liability on those who contribute to direct infringement – did not contemplate such a perverse result.

3. In finding that Grokster and StreamCast were protected by *Sony-Betamax*, the Ninth Circuit deemed it irrelevant that the services' primary use is infringement and that they can separate infringing from noninfringing uses. The court asserted instead that the services have

[21] Justice Blackmun's suggestion in dissent that the manufacturer could have designed "a VTR that enables broadcasters to scramble the signal of individual programs and 'jam' the unauthorized recording of them," 464 U.S. at 494 (Blackmun, J., dissenting), rested on the view that *all* unauthorized recording, including time-shifting, was infringing. But jamming unauthorized recordings would not have separated infringing and noninfringing uses in light of the Court's conclusion that unauthorized time-shifting was fair use.

noninfringing uses with "commercial viability." Pet. App. 12a. "Commercial viability" is not the correct standard. A product or service used primarily for infringement does not receive the benefit of the staple article of commerce defense merely because the provider might be able to cover the costs of doing business based on its noninfringing uses while profiting richly from infringement. Where, as here, a product or service is primarily used for infringement – especially where the tools for separation are readily available – the staple article of commerce defense does not apply.

In all events, the Ninth Circuit's claim that respondents' noninfringing uses are commercially viable is insupportable. To be consistent with *Sony-Betamax*, any meaningful definition of "commercial viability" would require a showing that Grokster and StreamCast are commercially successful in the marketplace on the basis of "wide[] use[] for legitimate, unobjectionable purposes," *Sony-Betamax*, 464 U.S. at 442. Otherwise, any noninfringing uses would be parasitic on the massive infringement that dominates the services. Grokster and StreamCast do not come close to meeting that standard. Infringing content is the powerful magnet that draws users to respondents' services and fuels their profits. Once users have joined, it is conceivable that a few may find it convenient to search respondents' services for public domain or authorized copyrighted works, even though they could find that material for free elsewhere. But there is no evidence that these noninfringing uses would attract a single user, much less enough users to create commercially sustainable networks.

4. Even without a showing of commercial viability or, indeed, evidence of any *actual* noninfringing uses, the Ninth Circuit held that it sufficed to trigger the staple article defense that Grokster's and StreamCast's services were merely *capable* of noninfringing uses. Pet. App. 12a. That "mere capability" test cannot be squared with *Sony-Betamax* or the principles that underlie it. Indeed, far from striking a

balance, as *Sony-Betamax* sought to do, a "mere capability" test gives *no* weight to effective protection of copyrights.

To the extent *Sony-Betamax* refers to a product's capabilities, it is in the context of discussing whether the product can currently be "*widely used* for legitimate, unobjectionable purposes." 464 U.S. at 442 (emphasis added). If the Court had applied a "mere capability" standard like the Ninth Circuit's, virtually all of *Sony-Betamax* would be superfluous dicta, because it was undisputed that *authorized* time-shifting was a noninfringing use of the Betamax (and indeed constituted a material percentage of its actual use).

If the Ninth Circuit's standard were the law, then *every* product or service used for reproduction or distribution of copyrighted works would be entitled to the staple article of commerce defense, because every such product or service is *capable* of being used to distribute public domain works or authorized copies of copyrighted works. As Judge Posner recognized, *Sony-Betamax* did not endorse any such result. "It is not enough . . . that a product or service be physically capable . . . of a noninfringing use," and Grokster and StreamCast cannot "escape liability for contributory infringement" merely by showing that their "file-sharing system[s] *could* be used in noninfringing ways." *Aimster*, 334 F.3d at 651, 653.

5. Finally, the Ninth Circuit also grossly exaggerated the evidence showing any noninfringing uses of Grokster and StreamCast. Indeed, the record is almost entirely devoid of evidence that *these services* are *ever* used for distribution of noninfringing copies, and thus cannot support a finding of "commercially significant noninfringing uses" under any standard, other than mere theoretical capability.

The Ninth Circuit was flat wrong to claim that it is "undisputed" that 10% of the use of the Grokster and

StreamCast systems is noninfringing. Petitioners submitted expert analysis, based on a statistical sample, demonstrating that 90% of the files being traded on respondents' services are known or very likely infringing; as to the remaining 10%, "there was not enough information to form reasonable conclusions either as to what those files even consisted of, and/or whether they were infringing or non-infringing." J.A. 439, 479. Respondents submitted no quantitative empirical analysis in response. Thus, there is literally no evidence in the record supporting the Ninth Circuit's assertion of 10% noninfringing use. It is merely an insupportable negative inference. That ignores the evidence.[22]

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[22] The remaining "evidence" on which the Ninth Circuit relied was speculative or anecdotal and hotly disputed below. For example, nothing in the record supports the court's assertion (without citation) that "the software has been used to share thousands of public domain literary works." Pet. App. 11a. Respondents contended that 187 "public domain" files *could* be traded over peer-to-peer systems like Grokster and StreamCast – including works by Shakespeare, excerpts from the Bible and the Koran, and presidential speeches. J.A. 206. But a search for those works to see if they were *actually* on respondents' networks typically located only single copies of nine of the works. *Id.* That is not surprising, because all of these public domain works are available elsewhere for free, so users have little reason to employ respondents' services to obtain or distribute them. Indeed, other than a few isolated examples of public domain or authorized works available on their networks, the balance of respondents' evidence was either hearsay or merely stated a willingness to have some public domain works distributed over peer-to-peer services. *See, e.g.*, J.A. 394-95 (artist had heard that fans had downloaded her works); J.A. 410-11 (witness admitted no knowledge of whether respondents' services were ever used to download material from Prelinger Archives); J.A. 406-09 (witness stated generally that some of Project Gutenberg's works are available on respondents' networks, but recalled only three that he had searched for); J.A. 390-91, J.E.R. 1359-62 (admitting that conclusion concerning the band Wilco was not based on first-hand knowledge, and conceding possibility that free downloads may have decreased Wilco's sales).

Given the absence of probative evidence of meaningful actual use of Grokster and StreamCast for legitimate purposes, Grokster and StreamCast would be entitled to summary judgment on this issue only if a handful of examples of lawful usage suffices to shield them from liability for the overwhelming infringement they make possible. That would water the standard down to the point of meaninglessness. *Sony-Betamax* requires much more to shield enterprises from liability for the infringement they knowingly make possible.

C. The Ninth Circuit's Novel Liability Rule Creates Perverse Incentives That Reward Efforts to Defeat Copyright Protection.

1. After erroneously concluding that respondents' services have commercially significant noninfringing uses, the Ninth Circuit compounded its error by inventing an unprecedented and irrational test for contributory liability where such noninfringing uses exist. Imposing temporal and knowledge restrictions found nowhere in *Sony-Betamax*, the Ninth Circuit held that such a defendant is liable for the infringement it enables and encourages only if it has knowledge of specific acts of direct infringement, and only if that knowledge comes at a time when the defendant can stop that particular infringement. *See* Pet. App. 13a. The court further held that Grokster's and StreamCast's knowledge of millions of specific acts of infringement on their services did not satisfy this newly minted standard, because their contribution to the infringement had largely occurred earlier (when they set up their services), and because they designed and modified their systems to minimize their ability to prevent infringing acts when they learned of them. *Id.*

As demonstrated, however, *Sony-Betamax* does not remotely support such a counterintuitive rule. *See supra* at 27-29. Having set in motion and sustained the enterprise that

makes the infringement possible, the defendant cannot escape liability merely because it might not be able to arrest the infringement at the precise moment it learns specific infringing acts will occur. The point of contributory infringement is to hold businesses and individuals responsible for infringement they help bring about, regardless of whether they control the direct infringer. *See, e.g., Screen Gems*, 256 F. Supp. at 402.[23] For example, one who advertises products he knows to be infringing is liable, even though he does not know exactly who will purchase the advertised items and can do nothing to stop the infringement when it happens. *E.g., id.*; *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 161 (3d Cir. 1984). Similarly, one who designs a product intending it to be used for infringement is liable irrespective of whether he can later stop the infringement he knows the product will make possible. *E.g., Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 846-47 & n.30 (11th Cir. 1990); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456-57 (C.D. Cal. 1996).

The way the Ninth Circuit applied its erroneous standard is equally flawed. In considering whether Grokster and StreamCast could stop a specific act of infringement at the moment it was occurring, the court rewarded respondents' willful blindness and efforts to tie their own hands. The Ninth Circuit absolved Grokster and StreamCast precisely because they had deliberately eliminated ready mechanisms for limiting infringement such as their log-in servers, and had steered clear of others such as filtering that would "allow [them] to see what [their] users are sharing," JA 928 ("I

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[23] Indeed, the Ninth Circuit has inappropriately imported into the law of contributory infringement the "supervision and control" requirement of vicarious liability and, even more incongruously, has incorporated that requirement into the assessment of a defendant's knowledge.

know this is something we DO NOT want to do"). "Willful blindness is knowledge, in copyright law . . . as . . . in the law generally. . . . [A] deliberate effort to avoid guilty knowledge is all that the law requires to establish a guilty state of mind." *Aimster*, 334 F.3d at 650; *see also id.* at 653 (rejecting attempt to evade liability where "Aimster blinded itself in the hope that by so doing it might come within the rule of the *Sony* decision"). But instead of recognizing respondents' willful efforts to blind themselves and tie their hands as confirmation of their responsibility for the infringement they caused, the Ninth Circuit simply accepted their self-imposed incapacitation as exculpatory.[24]

2. The Ninth Circuit's analysis also irrationally creates perverse incentives that affirmatively *reward* enterprises like Grokster and StreamCast for dismantling or avoiding measures that can be used to prevent copyright infringement. Under the Ninth Circuit's ruling, if commercially significant noninfringing uses are shown, a service can shield itself from liability simply by engineering out all means of stopping infringement. Pet. App. 13a, 18a.

[24] The courts below also exaggerated the extent to which Grokster and StreamCast had succeeded in shedding their abilities to detect and block infringement. Respondents have the ability to require an upgrade of the software their existing users already have to restore blocking mechanisms – not to mention upgrading software for *new* users – and to render the services practically unusable without such upgrade. J.A. 422-23, 448-53, 1158. The district court depicted respondents as passive bystanders by suggesting that if they "closed their doors," their services would continue in perpetuity without them. Pet. App. 45a. Not only is that assertion hotly contested, *see, e.g.*, J.A. 457 (evidence that network will degrade if ongoing maintenance ceases); J.A. 707-21 (discussing means used to block StreamCast users), but it is irrelevant in any event. Grokster and StreamCast have not "closed their doors"; they continue to profit from the infringement their services make possible by piping ads to the very users who are infringing; and indeed they add new users every day. The issue is not what would happen if respondents did nothing, but what they have done and continue doing to make infringement possible.

Thus, instead of encouraging companies to pursue their businesses so that they minimize the harm to others from infringement, the Ninth Circuit's rule creates an incentive to avoid having the ability to prevent infringement. Respondents' own counsel emphasizes that perverse incentive, advising that to create "plausible deniability," peer-to-peer operators must "let go of any control you may have over your users." Fred von Lohmann, *supra* ("choose an architecture that will convince a judge that . . . monitoring and control is impossible"). That is hardly the sort of innovation the law should encourage. *See* Ginsburg, *Copyright Use*, 24 Colum.-VLA J.L. & Arts at 37 (criticizing "rule that one who deliberately builds an online system in a way that confounds the distinction [between infringing and noninfringing uses] should escape liability").

The Ninth Circuit's approach also undermines innovation in legitimate copyright commerce. Internet services for licensed digital distribution of music and movies, such as Apple's iTunes or Movielink – which must charge a fee to cover licensing costs for copyrighted works – cannot compete on a level playing field when potential customers can get the same works for free on Grokster and StreamCast. The same unfair competition would hobble innovative peer-to-peer services that use filtering technology to ensure that copyrighted works are distributed over their networks only when authorized. To the extent these companies implement available means to prevent infringement, they *increase* their risk of liability under Ninth Circuit law. As a spokesman for Grokster's and StreamCast's codefendant Sharman Networks (operator of Kazaa) candidly put it, "I've got a great safe harbor right now," but under Ninth Circuit law a legitimate "peer-to-peer company using the [filtering] technology could be liable in the same way Napster was." David McGuire, *Mashboxx Aims to Make File Sharing Legit*, washingtonpost.com, Dec. 22, 2004.

Finally, by holding liable Napster but not the functionally equivalent Grokster and StreamCast services, *see* Pet. App. 13a, the Ninth Circuit has created a set of legal incentives that promotes a particular type of technology – decentralized rather than centralized service designs – regardless of its technological merit. If this holding stands, then "even if it happens to be the case that the most usable P2P [peer-to-peer] network for file trading requires a centralized indexing server, *Grokster* will have deterred the market from producing such a design." Andrew Chin, *Antitrust Analysis in Software Product Markets: A First Principles Approach*, 18 Harv. J.L. & Tech. 1, 82 (2004). Such "analytical approaches that attach liability to particular design choices" are antithetical to "innovation driven by quality competition in a well-functioning . . . product market." *Id.*

By immunizing even the most flagrant exploitation of copyright infringement, the Ninth Circuit has denied copyright owners meaningful protection in the digital era. The Ninth Circuit's ruling does not promote legitimate commerce, but businesses whose *raison d'etre* is infringement itself. The staggering success of these businesses threatens the very foundations of the incentive system on which our intellectual property laws rest. To restore that balance, this Court need do no more than apply the settled principles of contributory infringement recognized in *Sony-Betamax*.

II. Grokster And StreamCast Are Liable As Vicarious Infringers.

Grokster and StreamCast are also liable under the doctrine of vicarious liability. Their businesses depend on the copying and distribution of copyrighted material, and they reap substantial revenue after the initial download of their software based on the amount of infringement their businesses generate. They could also limit that infringement.

They have done just the opposite, however, precisely because they have a strong financial interest in preserving rather than preventing the infringing uses.

In assessing the vicarious copyright liability of such a copyright-dependent business, courts have universally applied the standard formulated in *H.L. Green*: "When [1] the right and ability to supervise coalesce with [2] an obvious and direct financial interest in the exploitation of copyrighted materials," liability is imposed "upon the beneficiary of that exploitation." 316 F.2d at 307; *see, e.g.*, *Sony-Betamax*, 464 U.S. at 437 n.18 (citing *H.L. Green* with approval); Nimmer, *supra*, at 12-70. The knowledge or intent of the secondary infringer is irrelevant, *e.g.*, *H.L. Green*, 316 F.2d at 307, and efforts to eliminate the means to control infringement do not eliminate liability, *see, e.g.*, *Gershwin*, 443 F.2d at 1163. Under these settled principles, Grokster and StreamCast are liable for the infringement on their services, notwithstanding their machinations to disassociate themselves from the direct infringement on which they depend.

A. Grokster and StreamCast Directly Profit from the Massive Infringement Occurring on Their Content-Distribution Services.

In at least two important (and undisputed) senses, Grokster and StreamCast have "an obvious and direct financial interest in the exploitation of [the] copyrighted materials" distributed over their services. *H.L. Green*, 316 F.2d at 307. First, unlike manufacturers of products like the Betamax, respondents are not indifferent to the extent of subsequent infringement by their users. To the contrary, respondents make their money from advertising to users each time they access the services to copy and distribute copyrighted works. Pet. App. 49a-50a. The larger the number of users attracted by infringing content, the more money Grokster and StreamCast make from advertising. *See*

H.L. Green, 316 F.2d at 306 (defendant's revenues varied directly with the gross receipts from the infringing record concessionaire). As the Ninth Circuit recognized, respondents' "direct financial benefit, via advertising revenue, [is] undisputed in this case." Pet. App. 16a.

Respondents also have a direct financial interest in a second sense: their businesses are predicated on the distribution of copyrighted materials. Grokster and StreamCast operate vast on-line bazaars for the distribution of music, movies, and other works subject to copyright. Like the defendants in *H.L. Green* and *Gershwin*, respondents "profit directly" from the performance or distribution of copyrighted works because those works are a central draw for their users. Indeed, copyrighted material is the "glittering object," *Napster*, 114 F. Supp. 2d at 922, that attracts users. It is thus not surprising that Grokster and StreamCast did not contest the presence of a direct and obvious financial benefit from infringement.

B. Grokster and StreamCast Have the "Right and Ability" to Supervise or Control Infringement, Despite Their Efforts to Tie Their Own Hands.

1. The receipt of a direct financial benefit from the exploitation of copyrighted materials informs the remainder of the analysis by identifying situations in which it is reasonable to hold a business liable for failing to supervise or control infringement. When a business receives ongoing financial benefit from infringing activity, vicarious liability creates the needed incentive for that business to adopt reasonably available measures to prevent the infringement, thereby counteracting the otherwise powerful financial incentive it has to *maximize* infringement. Imposition of vicarious liability also ensures that responsibility for preventing infringement is placed on the entity best positioned to discharge that duty, and imposes the costs of

infringement on the entity that profits from it. In these circumstances, vicarious liability is "manifestly just." *Sony-Betamax*, 464 U.S. at 437 & n.18 (citing *H.L. Green* and other vicarious liability cases).

Over the years, other businesses that similarly profit directly from copyright infringement and could supervise or control it – and thus would be liable under traditional principles – have tried to insulate themselves from vicarious liability by arranging for a third party to carry out the direct infringement and then renouncing supervision and control over the direct infringer. Courts have invariably rejected such efforts to achieve "plausible deniability," even when strict application of agency law might not, by itself, dictate liability. *See H.L. Green*, 316 F.2d at 307; *see also Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929). Looking to substance, courts have "trace[d], case by case, a pattern of business relationships which would render one person liable for the infringing conduct of another." *H.L. Green*, 316 F.2d at 307.

In *H.L. Green*, a department store chain was vicariously liable for large-scale infringement by an independent contractor that ran the chain's record departments. The chain could not evade liability by outsourcing management of the record operation in that manner. Because it had both the contractual right and practical ability to supervise the independent contractor, liability was appropriate for the chain's failure "to police carefully the conduct of its concessionaire," notwithstanding the absence of a formal agency relationship. *Id.* at 308; *see also Gershwin*, 443 F.2d at 1162.

While placing weight on the chain's contractual rights to supervise its concessionaire, 316 F.2d at 306, 308, *H.L. Green* recognized that a business that distributes or performs copyrighted works cannot escape liability merely by

contractually ceding the right to supervise, explaining that "the cases are legion" in which dance hall operators have been held liable "*whether or not the proprietor has . . . any control over*" the compositions played. *Id.* at 307 (emphasis added); *see, e.g.*, *Dreamland Ball Room*, 36 F.2d at 355; *Irving Berlin, Inc. v. Daigle*, 26 F. Supp. 149, 149-50 (E.D. La. 1928), *rev'd in part on other grounds*, 31 F.2d 832 (5th Cir. 1929); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470, 475 (E.D.S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924). Similarly, vicarious liability was imposed in *Gershwin* despite the secondary infringer's careful avoidance of any contractual right to control the direct infringer. 443 F.2d at 1163.

As these cases demonstrate, businesses that directly profit from infringement cannot immunize themselves from vicarious copyright liability by avoiding the legal or practical control they would otherwise have over the direct infringer.

2. Grokster and StreamCast are simply digital-age versions of the record sellers or dance-hall operators that, when facing liability for failing to supervise or control the infringement from which they directly profit, seek to evade that liability by leaving the dirty work to others. Respondents have created "virtual stores" – their networks of users and the copyrighted works on their users' computers – that allow users to copy movies and music, in exchange for the users' receipt of the advertising that makes respondents money. Rather than supplying the content themselves, respondents conscript users to do it. Their software automatically makes music and movie files on the users' computers available for copying by all other users of the service. *Supra* at 4-5. Respondents have similarly delegated the indexing function to users whose computers serve as repositories for searchable lists of material available on the network, allowing users all over the network to find works to copy. *Supra* at 9-10. This is the sort of clever "outsourcing"

that has never sufficed to immunize a business that directly profits from infringing distribution or performance of copyrighted works. *See supra* 45-46.

Respondents plainly retained initially both the legal right and practical ability to supervise or control infringement by those users to whom they delegated the copying and distribution functions. *See generally Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (noting both the legal right and ability to control identified in *H.L. Green* and the practical ability to control described in *Gershwin*). Grokster and StreamCast, for example, each had licensing agreements that expressly gave them the legal right and ability to prevent infringement by terminating a user's access to their services "upon any single act of infringement." *Supra* at 11. *See Fonovisa*, 76 F.3d at 263 (noting the ""unreviewable discretion' to discharge the concessionaires' employees" in *H.L. Green*) (quoting *H.L. Green*, 316 F.2d at 306). They also had the practical ability to prevent infringement. Both Grokster and StreamCast had log-in and registration functions that allowed them to restrict the access of infringing users.

Grokster and StreamCast cannot escape liability because they disabled the legal and practical mechanisms they had previously used. Thus, that StreamCast has taken the all-but-unprecedented step of eliminating its licensing agreement does not immunize it from liability. Courts have consistently rejected such charades. *See supra* at 45-46. Respondents' decision to eliminate log-in and registration functions is similarly of no consequence. Vicarious copyright liability arises directly from that kind of failure to exercise supervision or control. *See Gershwin*, 443 F.2d at 1162.

Here, moreover, respondents have also refused to implement other readily available mechanisms that would prevent the transfer of works that infringe petitioners'

copyrights. Petitioners offered evidence showing that such technologies are readily available and effective and could be employed with respondents' present services. *Supra* at 10-12. Petitioners also showed that Grokster and StreamCast have the practical ability to make any needed upgrades to the software required by their users to access the service. *Supra* at 11-12. And even if there were some impediment to making that change for existing users, Grokster and StreamCast can unquestionably add filtering capabilities to the software they give away to *new* users. Indeed, they filter to block viruses and bogus files that undermine their business interests by interfering with infringement. Respondents' unwillingness to use such readily available means of preventing infringement makes vicarious liability entirely appropriate.

3. As even the Ninth Circuit recognized, nothing in *Sony-Betamax* supports extension of the staple article of commerce defense to the doctrine of vicarious liability. Pet. App. 16a. Vicarious liability was not before the Court in *Sony-Betamax*. 464 U.S. at 435 n.17, 438. At the same time, the Court cited *H.L. Green* and other vicarious liability cases as instances where liability for indirect infringement is "manifestly just." *Id.* at 437 & n.18. Indeed, the monopoly leveraging concerns that drove the analysis in *Sony-Betamax* are absent in this context. Vicarious liability applies when a business that directly profits from the performance or distribution of copyrighted works can supervise or control what occurs under its auspices in order to detect and stop infringing activities. In these circumstances, the risks that the lawful copyright monopoly will be leveraged over independent noninfringing areas of commerce are minimal, if they exist at all. *See supra* at 32-34.

4. In the name of protecting "innovation," the Ninth Circuit found that the actions of Grokster and StreamCast are a basis for immunity, not liability. Pet. App. 18a. That

analysis turns vicarious liability law on its head. Vicarious liability is intended to "encourage" a business that could profit from infringement to exercise supervision and control, not shed it. *H.L. Green*, 316 F.2d at 308; *see also id.* at 309 (refusing to allow distributors of infringing works to open "'dummy' concessions and shiel[d] their own eyes from the possibility of copyright infringement, thus creating a buffer against liability while reaping the proceeds of infringement"). The Ninth Circuit's decision does precisely the opposite. Indeed, the Ninth Circuit's vicarious liability analysis fosters innovation of a most unwelcome kind, perversely encouraging innovators to disable or avoid the means of preventing infringement even when employment of those means would allow legitimate noninfringing activity to continue. *See supra* at 40-42.

Moreover, the policy choices undergirding the Ninth Circuit's approach are impossible to square with the approach of the Digital Millennium Copyright Act ("DMCA"). In the DMCA, Congress established safe harbors from secondary liability for Internet service providers engaging in specific functions, on the condition that they "cooperate to detect and deal with copyright infringements that take place in the digital networked environment." S. Rep. 105-190, at 40. The safe harbors are available only if "the service provider . . . has adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers and account holders . . . who are repeat infringers." 17 U.S.C. § 512(i)(1)(A).[25]

Of course, Grokster and StreamCast do not remotely qualify for those statutory safe harbors. The Ninth Circuit's

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[25] *See also id.* § 512(b)(2)(E), (c)(1)(C), (d)(1)(C) (extending safe harbors only to service providers who disable access to infringing materials under certain circumstances).

approach is thus doubly mistaken. First, far from truncating traditional secondary liability law (as the Ninth Circuit has done), Congress endorsed it. Second, the incentives created by the Ninth Circuit's decision are precisely contrary to the ones Congress sought to create in the DMCA context. The Ninth Circuit exonerated Grokster and StreamCast precisely because they refuse to deny access to infringing material and have actively undermined their ability to deny access to repeat infringers.

Ultimately, the perverse incentives created by the decision below are symptomatic of the Ninth Circuit's broader distortion of traditional principles of copyright law. As the Ninth Circuit would have it, businesses designed, promoted, and used overwhelmingly for infringement of copyrighted materials may profit from that infringement as long as they tie their hands, while the creators of the copyrighted material must stand by helplessly as the value of their copyrighted works vanishes. That result is antithetical to the balance struck in *Sony-Betamax*, and undermines the very foundations of copyright law that the Framers believed critical to "motivate the creative activity of authors" and artists, and to "induce release to the public of the product of their creative genius." *Sony-Betamax*, 464 U.S. at 429 (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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